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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ZWIERCAN, JR., Defendant and Appellant.	E046594 (Super.Ct.No. RIF126816) **OPINION**

APPEAL from the Superior Court of Riverside County. Paul E. Zellerbach, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry Carlton, Janet Neeley and Elizabeth A. Hartwig, Deputy Attorneys General, for Plaintiff and Respondent.

Mennemeier, Glassman & Stroud, Kenneth C. Mennemeier and Kelcie M. Gosling for Arnold Schwarzenegger, in his official capacity as Governor of the State of California, and the California Department of Corrections and Rehabilitation as Amici Curiae on behalf of Plaintiff and Respondent.

When defendant Richard Zwiercan, Jr., was 18, he digitally penetrated and then had sexual intercourse with a 17-year-old female student in a girls' restroom at their high school. A few weeks later, he did practically the same thing in practically the same place with a different 17-year-old female student.

The first victim admitted consenting, albeit reluctantly. With respect to her, defendant was charged with and found guilty of unlawful sexual penetration of a minor with a foreign object (a felony) and unlawful sexual intercourse with a minor (a misdemeanor).

The second victim testified that she did not consent. Hence, with respect to her, defendant was charged with forcible rape and felony false imprisonment. The jury evidently was not convinced; it found defendant guilty only of battery (a misdemeanor).

The trial court placed defendant on probation. However, it refused to reduce the felony to a misdemeanor, and it required him to register as a sex offender. Thus, defendant contends:

1. The trial court erred by refusing to reduce defendant's conviction for unlawful sexual penetration of a minor with a foreign object from a felony to a misdemeanor.

2. It is a violation of equal protection to require defendant to register as a sex offender based on the consensual sexual penetration of a minor with a foreign object when he would not have been required to register based on consensual sexual intercourse with the same minor.

3. The residency restrictions and other requirements applicable to registered sex offenders under Proposition 83 ("Jessica's Law") cannot be applied to defendant without violating constitutional ex post facto principles.

We find no reversible error. Accordingly, we will affirm.

I

FACTUAL BACKGROUND

In early October 2005, defendant arranged to meet Jane Doe 2 in a girls' bathroom at their high school. Defendant was 18; Doe 2 was 17.

They went into the handicapped stall and shut the door. Defendant made it clear that he wanted sex. Doe 2 kept saying, "No." She opened the stall door, but he closed it again and stood blocking her way. Finally, so he would leave her alone, she told him, "[O]kay." Defendant put his fingers in her vagina, then had sexual intercourse with her.

On October 31, 2005, Jane Doe 1 was just leaving the handicapped stall of a girls' bathroom at the same high school when defendant pushed her back in. Doe 1 was also 17.

Although Doe 1 was saying, "Stop" and trying to push defendant away, he put a finger or fingers in her vagina. He then sat on the toilet and pulled her backwards onto

his lap, thereby having sexual intercourse with her for "three to seven seconds." She got up and left.

Doe 1 reported that defendant had raped her. After hearing about the incident involving Doe 1, Doe 2 contacted school authorities.

Defendant admitted digitally penetrating and having intercourse with Doe 2, but he claimed that she initiated the sex. He also admitted digitally penetrating and having intercourse with Doe 1; he testified that the sex was consensual, although Doe 1 changed her mind and stopped after a matter of seconds.

As "prior bad acts" evidence, two other girls testified that, when they were 16, defendant grabbed their breasts. Also, two female coworkers testified that defendant cornered each of them in a walk-in freezer and tried to kiss one of them.

II

PROCEDURAL BACKGROUND

A jury returned the following verdicts:

Count 1: Not guilty of forcible rape, a felony (Pen. Code, §§ 261, subd. (a)(2), 264, subd. (a)), allegedly committed against Jane Doe 1; but guilty of the lesser offense of battery, a misdemeanor (Pen. Code, § 242).

Count 2: Not guilty of false imprisonment by violence, a felony, allegedly committed against Jane Doe 1; and not guilty of the lesser offense of false imprisonment, a misdemeanor (Pen. Code, §§ 236, 237, subd. (a)).

Count 3: Guilty of unlawful sexual penetration of a minor with a foreign object, a wobbler (Pen. Code, § 289, subd. (h)), allegedly committed against Jane Doe 2.

Count 4: Guilty of unlawful sexual intercourse with a minor not more than three years older or younger than the perpetrator, a misdemeanor (Pen. Code, § 261.5, subd. (b)), allegedly committed against Jane Doe 2.

The trial court placed defendant on probation for three years, on conditions including the service of 217 days in the sheriff's work release program.

III

REFUSAL TO REDUCE THE FELONY TO A MISDEMEANOR

Defendant contends that the trial court erred by refusing to reduce his conviction for unlawful sexual penetration of a minor with a foreign object (Pen. Code, § 289, subd. (h)) (count 3) from a felony to a misdemeanor.

A. *Additional Factual and Procedural Background.*

Defendant filed a sentencing memorandum in which he asked the trial court to reduce count 3 to a misdemeanor. He argued that he and the victim were close in age and that the sexual activity was consensual.

The prosecution opposed the request, arguing that, even if the sexual activity was consensual, it involved "extreme manipulation and duress" and that defendant's history of sexually assaultive conduct showed that he was "out of control."

The trial court refused to reduce the offense to a misdemeanor. It commented, "If this were a single event, I might be more inclined to do that . . . . But I think [defendant]

can certainly benefit from formal supervised probation. And I think his continual conduct over those [*sic*] several-year period of time demonstrate[s] that, at least in my opinion, that this is felonious conduct . . . . "

B. *Analysis*.

Unlawful sexual penetration of a minor with a foreign object is a "wobbler" — i.e., it is punishable, in the trial court's discretion, as either a felony or a misdemeanor. (Pen. Code, § 289, subd. (h); see also *id*. at § 17, subd. (b).)

The applicable standard of review is abuse of discretion. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 980.) "'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.] Concomitantly, '[a] decision will not be reversed merely because reasonable people might disagree. "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." [Citations.]' [Citation.]" (*Id*. at pp. 977-978.)

The relevant factors "include[] 'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' [Citations.] When appropriate, judges should also consider the general objectives of sentencing . . . . [A] determination made outside the perimeters drawn by individualized consideration of the offense, the

offender, and the public interest 'exceeds the bounds of reason.' [Citations.]" (*People v. Superior Court* (*Alvarez*), *supra,* 14 Cal.4th at p. 978, fn. omitted.)

Defendant essentially argues that his crime was, in some fundamental sense, misdemeanor conduct. As he points out, although it is a wobbler for an 18 year old to place his finger in a 17 year old's vagina with her consent, for him to do the same thing with his penis can be no more than a misdemeanor. (Pen. Code, § 261.5, subd. (b).) Defendant complains that this distinction "defies logic." Nevertheless, it is a distinction that the Legislature has seen fit to draw.[1]

Admittedly, the fact that the victim was only a year younger than defendant, the fact that the foreign object was only a finger, and the fact that the penetration was consensual were all mitigating circumstances. We may assume — without deciding — that, in the absence of any aggravating circumstances, they would have required the trial court to reduce the offense to a misdemeanor. As the trial court noted, however, there was also the aggravating circumstance that defendant had a history of recidivist sexually assaultive conduct. It was not an abuse of discretion to sentence defendant as a felon based on this aggravating circumstance.

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[1] Defendant has never argued, at trial or on appeal, that this distinction violates equal protection. (Cf. part IV, *post*.) Hence, he has forfeited any such contention.

IV

REQUIRING DEFENDANT TO REGISTER AS A SEX OFFENDER FOR SEXUAL PENETRATION OF A MINOR WITH A FOREIGN OBJECT WHEN HE WOULD NOT HAVE BEEN REQUIRED TO REGISTER FOR SEXUAL INTERCOURSE WITH A MINOR

Defendant contends that it is a violation of equal protection to require him to register as a sex offender based on the consensual sexual penetration of a minor with a foreign object when he would not have been required to register based on consensual sexual intercourse with the same minor.

A. *Additional Factual and Procedural Background.*

In his sentencing memorandum (see part III.A, *ante*), defendant also asked the trial court to rule that his conviction on count 3 did not require him to register as a sex offender. He argued, citing *People v. Hofsheier* (2006) 37 Cal.4th 1185, that a mandatory registration requirement would violate equal protection, because a defendant who was convicted of unlawful sexual intercourse with a minor (Pen. Code, § 261.5) under the same circumstances would not be subject to mandatory registration.

The prosecution did *not* disagree. To the contrary, it expressly conceded: "*Hofsheier* does allow defendant to make this request of the court." It merely argued that the trial court should impose a registration requirement in the exercise of its discretionary

power under former Penal Code section 290, subdivision (a)(2)(E) (Stats. 1985, ch. 1474, § 2, pp. 5406-5410; see now Penal Code section 290.006).[2]

The trial court stated, "I am going to require that he register." It explained, "[W]ith respect to the registration aspect, I know that . . . [an appointed expert] has concluded . . . that the defendant does not appear to be a danger to . . . the community . . . . [¶] I am not totally convinced of that at this point. . . . [¶] . . . Again, I think that's another appropriate term or condition that should be imposed, based upon the number of victims in this case and the length of time that this conduct continued on." Accordingly, it directed defendant to register as a sex offender pursuant to Penal Code section 290.

B. *Analysis.*

A person must register as a sex offender if he or she is convicted of an offense specified in Penal Code section 290, subdivision (c). (Pen. Code, § 290, subd. (b).) The specified offenses include:

1. Unlawful sexual penetration with a foreign object. (Pen. Code, § 289.) Sexual penetration with a foreign object can be unlawful because it is involuntary.[3] (Pen. Code,

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[2] Similarly, the prosecutor told the trial court, "[A] 261.5, it's optional as far as registration goes. . . . 289(h) registration says that it's mandatory, but under cases such as *Hof*[*sheier*], . . . there is a movement that basically it is becoming optional." (Underscoring deleted, italics added.)

[3] We use "involuntary" in "a special and restricted sense" (see *People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1193, fn. 2) to mean that either (1) the victim actually and subjectively does not consent, or (2) the victim is legally unable to consent for some reason other than minority, such as intoxication or unconsciousness.

§ 289, subds. (a)-(e), (g).) However, it can also be unlawful because the victim is a minor. (Pen. Code, § 289, subds. (h)-(j).)

2. Unlawful oral copulation. (Pen. Code, § 288a.) Like sexual penetration with a foreign object, oral copulation can be unlawful because it is involuntary (Pen. Code, § 288a, subds. (c)(2)-(3), (d), (f)-(i), (k)) or because the victim is a minor (Pen. Code, § 288a, subds. (b), (c)(1)).

3. Unlawful sexual intercourse, but only if the sexual intercourse is unlawful because it is involuntary. (Pen. Code, § 261, subds. (a)(1)-(4), (6).)

A person convicted of unlawful sexual intercourse is *not* required to register as a sex offender if the sexual intercourse is unlawful because the victim is a *minor*. (Pen. Code, § 261.5.)

In addition to this mandatory registration scheme, the trial court has discretion to require a person convicted of *any* offense to register as a sex offender, "if the court finds . . . that the person committed the offense as a result of sexual compulsion or for purposes of sexual gratification. The court shall state on the record the reasons for its findings and the reasons for requiring registration." (Pen. Code, § 290.006.)

In *People v. Hofsheier*, *supra*, 37 Cal.4th 1185, the California Supreme Court held that Penal Code section 290 violates equal protection to the extent that it imposes a mandatory registration requirement on a defendant convicted of unlawful oral copulation with a minor (Pen. Code, § 288a, subd. (b)(1)) when it would not have imposed it on a

defendant convicted of unlawful sexual intercourse with a minor (Pen. Code, § 261.5) under the same circumstances.

Defendant argues that the reasoning in *Hofsheier* with respect to unlawful oral copulation applies equally to unlawful sexual penetration with a foreign object. We need not decide this question. Here, the prosecution *conceded* that *Hofsheier* barred the *mandatory* imposition of a registration requirement; it therefore asked the trial court to impose a registration requirement *discretionarily* under Penal Code section 290.006. It appears that this is exactly what the trial court did.

Defendant disputes this. He notes that the trial court did not discuss, consider, or make any findings as to whether he committed the offense "as a result of sexual compulsion or for purposes of sexual gratification," as Penal Code section 290.006 would require. The trial court, however, equally did not discuss, consider, or make any findings regarding defendant's equal protection challenge. In light of the prosecution's concession that *Hofsheier* barred the mandatory imposition of the registration requirement and its request that the trial court impose the registration requirement discretionarily, we can only conclude that the trial court was exercising its discretion.

Admittedly, it appears to have exercised its discretion based on improper factors. It stated that it was imposing a registration requirement based on the possibility that defendant was a danger to the community, the number of victims, and "the length of time that this conduct continued on." These factors, while arguably relevant to defendant's

request to reduce the conviction to a misdemeanor, were irrelevant to the discretionary imposition of the registration requirement.

Nevertheless, the error was harmless under any standard. (Indeed, even assuming the trial court did believe that the registration requirement was mandatory, and even assuming that this was error under *Hofsheier*, the error would still be harmless.) On this record, it was incontrovertible that defendant committed count 3 for purposes of sexual gratification. He admitted engaging in sexual activity with Doe 2; he merely claimed that the activity was consensual. Accordingly, we are convinced, beyond a reasonable doubt, that even if the trial court had considered the appropriate factors, it would have imposed the registration requirement discretionarily. Moreover, it would be an idle act for us to remand with directions to reconsider whether to impose the registration requirement discretionarily; it is a foregone conclusion that the trial court would do so.

We therefore hold that defendant is properly subject to the requirement that he register as a sex offender.

V

EX POST FACTO OPERATION OF JESSICA'S LAW

Defendant contends that, because he committed his offense before Jessica's Law went into effect, it cannot be applied to him without violating ex post facto principles.[4]

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[4] This issue is presently before the California Supreme Court in *In re E.J.* (S156933), *In re S.P.* (S157631), *In re J.S.* (S157633) and *In re K.T.* (S157634).

Proposition 83, also known as the "Sexual Predator Punishment and Control Act," or "Jessica's Law," became effective on November 8, 2006. Under Jessica's Law, as relevant here, a registered sex offender is prohibited from residing within 2,000 feet of any school or any "park where children regularly gather." (Pen. Code, § 3003.5, subd. (b).) Also, a registered sex offender who has been "committed to prison and released on parole" must be monitored by a global positioning system (GPS) during parole (Pen. Code, § 3000.07, subd. (a)) and thereafter for life (Pen. Code, § 3004, subd. (b)).[5]

The trial court ordered defendant to register as a sex offender. However, it did not specifically determine one way or another whether he was subject to Jessica's Law; it did not order him not to live within 2,000 feet of a school or park, and it did not order that he would be subject to GPS monitoring.

The People argue that defendant's contention is not ripe because it does not appear that there has been any attempt to apply the residency restriction to him. We agree that defendant's contention is not justiciable at this time, although we consider the obstacle to be not so much a matter of ripeness as of appealability.

"Generally speaking, an appellate court reviews legal rulings made by the trial court." (*People v. Borland* (1996) 50 Cal.App.4th 124, 129.) "Because no ruling was actually made below, 'no review can be conducted here.' [Citations.]" (*People v.*

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[5] Defendant was placed on probation. Accordingly, even assuming Jessica's Law applies to him, he cannot be subject to its GPS monitoring requirement unless he violates his probation, is sentenced to prison, and is released on parole.

Samayoa (1997) 15 Cal.4th 795, 827.) "'[T]he absence of an adverse ruling precludes any appellate challenge.' [Citation.]" (*People v. Rowland* (1992) 4 Cal.4th 238, 259; accord, *People v. McPeters* (1992) 2 Cal.4th 1148, 1179.)

We recognize that defendant has a genuine need to know where he can and cannot live — "maybe not today, maybe not tomorrow, but soon and for the rest of [his] life." (Julius J. Epstein, Philip G. Epstein, and Howard Koch, *Casablanca* (1942).) Nevertheless, we must decline to render an advisory opinion. We must also decline to give defendant legal advice with respect to whether he has a remedy by way of a petition for habeas corpus, an action for declaratory relief, or otherwise. We can and do hold only that he does not have a remedy by way of appeal.

VI

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

McKINSTER
Acting P.J.

KING
J.